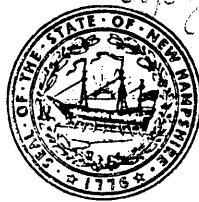


Opinion

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The State of New Hampshire



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folder in 424.10*

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Concord

September 16, 1976

His Excellency, Meldrim Thomson, Jr.
and The Honorable Council
Office of the Governor of the State
of New Hampshire
State House
Concord, New Hampshire 03301

Gentlemen:

You have requested our opinion "as to whether physicians and psychiatrists may be appointed to the State Hospital in the absence of a Director of Mental Health." We understand that your question relates specifically to appointment of senior physician-psychiatrists to staff positions created by RSA 135:6-a (Supp. 1975), which provides:

135:6-a Staffing.

I. There are hereby established the following positions:

- (a) Sixteen positions of unit director,
and
- (b) Eleven positions of senior physician/
psychiatrist.

* * * *

IV. The superintendent with the approval of the director of the division of mental health, shall appoint qualified medical personnel to the positions established by paragraph I.

The Director of the Division of Mental Health must be a "physician-psychiatrist licensed or eligible for licensure as an M.D. in New Hampshire

His Excellency, Meldrim Thomson, Jr.
and The Honorable Council
September 16, 1976
Page two

and certified or eligible for certification by the American Board of Neurology and Psychiatry." RSA 126-A:6 (Supp. 1975). He must be appointed from two or more nominees submitted by the Commissioner of Health and Welfare after consultation with the Advisory Commission on Health and Welfare and a select committee consisting of persons interested and knowledgeable in the field of mental health. Id. Once appointed by the Governor and Council, the Director is "responsible for the administrative and executive direction" of the Division, subject to the approval of the Commissioner of the Department. Id. The Superintendent of the State Hospital is "responsible for the administrative and executive direction of the New Hampshire Hospital" (RSA 135:3 (Supp. 1975)), but, unlike the Director, he is not required to possess background or training in medical or mental health problems. Like the Superintendent, the Commissioner of Health and Welfare need not be a licensed physician-psychiatrist. His expressly detailed duties similarly do not include the appointment of professional staff to the State Hospital. See RSA 126-A:4 (III) (Supp. 1975).

No statute has been discovered which would permit either the Superintendent or the Commissioner of Health and Welfare to make these appointments when the position of Director is vacant. All staff positions created by statute (including the Assistant Superintendent for Professional Services (RSA 135:4-a (Supp. 1975)), the Assistant Superintendent (RSA 135:5 (Supp. 1975)), 16 Unit Directors and 11 Senior Physician-Psychiatrists (RSA 135:6-a (Supp. 1975))) may be filled by the Superintendent only with the approval of the Director of the Division of Mental Health Services. By requiring that proposed staff appointments be approved by the Director, the Legislature has clearly indicated its intention that a physician-psychiatrist review the qualifications of prospective personnel at the State Hospital. The fact that the Legislature has not chosen to require that either the Superintendent or the Commissioner be a physician-psychiatrist suggests that it did not intend that either should review and approve the professional qualifications of prospective Hospital staff in the absence of a Director.

The question may arise whether a so-called Acting Director might be designated to make the appointments desired. It is our opinion that one may not be appointed. No statute has been found authorizing either the Governor and Council or the Commissioner to appoint a person to act as Director pending a permanent appointment. This omission is no doubt a reflection of the Legislature's intention that the position of Director of the Division of Mental Health not be left vacant for any extended period of time. See Opinion of the Justices, 114 N.H. 165, 168 (1974)

His Excellency, Meldrim Thomson, Jr.
and The Honorable Council
September 16, 1976
Page three

(in the absence of a specific time limitation for appointments to fill vacancies, the law implies a "reasonable time"). RSA 126-A:6-a does require that each Director appoint a member of his staff to "act in his stead when said Director is absent from the State and at such other time as he is so directed by the Director," but, since the authority of such an Acting Director is to act only in his Director's "stead," it is clear that such authority is wholly derivative from the authority of the Director making the appointment and expires upon the creation of a vacancy in the position of Director. Put another way, the Legislature does not appear to have intended by the enactment of RSA 126-A:6-a to permit the Director of the Division of Mental Health to invest a subordinate with power to act beyond the end of his term.

A further question is suggested whether a grant to either the Commissioner or Superintendent of power over the "administrative and executive direction" of the Hospital implies the power to appoint senior physician-psychiatrists in the absence of a Director of the Division of Mental Health. Our opinion is that it does not. The Legislature has demonstrated its ability to recognize and provide for the temporary assumption of powers in cases where an office falls vacant. See, e.g., RSA 7:3 (Supp. 1975) (authorizing the Deputy Attorney General to act as Attorney General whenever the latter is absent or unable to act or whenever the position of Attorney General is vacant). Its failure to make a similar provision for the temporary exercise of the Director's powers must be regarded as purposeful.

For the foregoing reasons, we are obliged to answer your question of September 2 in the negative.

If the need should become acute for the services of a person who might otherwise be appointed to fill one of the statutory positions in question, there is always a possibility of creating a temporary classified position under RSA 98:17-a which could be filled with such a person until a Director of Mental Health is appointed. Apart from the necessary uncertainty that an as yet unidentified Director would approve appointment of any given person to one of the statutory positions, to attempt such a procedure in the present case would raise questions whether the salary level of such temporary position would be adequate to attract an appropriate person and whether it would be wise for the Hospital to use available funds for this purpose. These last two questions are not legal ones,

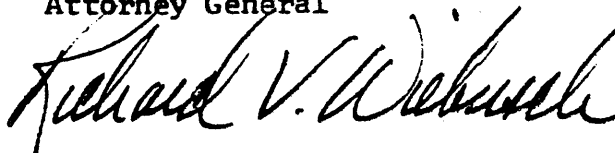
His Excellency, Meldrim Thomson, Jr.
and The Honorable Council
September 16, 1976
Page four

and I do not have answers to them at this time. If the Commissioner of Health and Welfare believes it is worthwhile to explore answers to these questions, we will provide whatever help we can in the process.

Yours respectfully,

A handwritten signature in black ink, appearing to read "David H. Souter".

David H. Souter
Attorney General

A handwritten signature in black ink, appearing to read "Richard V. Wiebusch".

Richard V. Wiebusch
Assistant Attorney General